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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1978

STATE OF WASHINGTON, et al.,

Appellants,

vs.

CONFEDERATED TRIBES OF THE COLVILLE INDIAN RESERVATION, et al.,

Appellees.

STATE OF WASHINGTON,

Appellant,

vs.

UNITED STATES OF AMERICA,
and
CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION,

Appellees.

ON APPEAL FROM THE DISTRICT COURT OF THE EASTERN DISTRICT OF WASHINGTON

BRIEF OF APPELLEE, YAKIMA NATION

JAMES B. HOVIS
HOVIS, COCKRILL & ROY
Counsel for Appellee, Yakima Nation

Office and Post Office Address:
316 North Third Street
Yakima, Washington 98907
Telephone: (509) 575-1500

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BRIEF OF APPELLEE, YAKIMA NATION

JURISDICTION

This appeal is not within the jurisdiction of this Court.

The Solicitor General submits that this Court does

not have jurisdiction under 28 USC 1253, because this case was not one required to be heard by a three-judge district court, and that consequently, this appeal is not within this Court's appellate jurisdiction. The Confederated Tribes and Bands of the Yakima Indian Nation, hereinafter called "Yakima Nation" joins in the Solicitor General's submission and believes that the cited cases *Swift and Company v. Wickham*, 382 U.S. 111, 129 (1965); *Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463, 481 n. 17 (1976), *Phillips v. United States*, 312 U.S. 246, 252 (1941), are apposite.

A distinction has been clearly drawn by this Court between direct attacks on the constitutionality of a state statute and attacks on the constitutionality of the result obtained by the use of a state statute. *Phillips v. United States*, supra. This case falls within the later alternative. No state statute or order has been found or claimed to be unconstitutional. It is the *result* of the use of a state statute in matters involving Indian Commerce or transactions within Indian Reservations that form the basis of the Appellees contentions below. No attempt was made to declare state statutes unconstitutional. It was the *result* obtained by the use of a state statute on Indian commerce or transactions within an Indian Reservation that appellee's sought to restrain.[1]

[1] This Appellant admits. See Appellant's Opening Brief, p. 42-43.

The State of Washington has clearly recognized this distinction. After the District Court's preliminary injunction issued on September 6, 1974 and even after the final injunction issued on May 10, 1978, the state of Washington has continued to administer its tax laws without legislative response to the District Court's determination. This appears to your writer to be the controlling aspect of this case irregardless of whether this result obtained from the use of a state statute was prohibited by the Commerce Clause or the Supremacy Clause.

The District Court's determination was limited to tribes and tribal licensees operating under an overall tribal ordinance or law and did not have statewide application. The District Court's determination therefore did not call for a three judge District Court. See: *Board of Regents of the University of Texas System v. New Left Education Project*, 404 U.S. 541, 544 (1971).

The Yakima Nation did not seek to invoke 28 USC §2881.

QUESTIONS PRESENTED

1. Whether a three-judge District Court was lawfully convened under 28 U.S.C. §2281 such that this Court has jurisdiction over this appeal pursuant to 28 U.S.C. §1253.

2. Whether a state may impose upon an Indian

tribe and/or its licensed retailers the obligation to collect and remit state excise taxes on sales of personal property to non-members on trust lands where the state has no applicable criminal or civil jurisdiction over the Indian seller.

The three-judge District Court determined that the legal incidence of imposition of the tobacco excise tax is on the seller and that the legal incidence of the state cigarette and sales excise taxes are on the purchaser. The three-judge District Court has determined that the imposition of sales and cigarette excise taxes on the non-Indian purchaser of cigarettes is an interference with tribal self-government as it would be economically destructive of the tribal enterprises. No such determination was made as to the sales excise tax on sales of other personal property. The three-judge District Court found that the sales of cigarettes by tribally licensed Indian retailers has been pre-empted by tribal ordinance. These determinations by the District Court give rise to the following subordinate questions to (2) above:

a) Whether tribally regulated Indian retailers have an obligation to collect and remit state taxes on sales of personal property (cigarettes) to non-members when the sales transaction is already being regulated and taxed by an Indian tribe having reserved this sovereign power when the Secretary

of Interior has approved such regulation and taxation.

b) Whether the imposition of an obligation upon an Indian tribe and/or its licensed retailers to collect and remit state excise taxes on the tribally taxed sales of personal property to non-members thereby giving non-Indian retailers a price advantage and thereby severely effecting an established tribal enterprise, infringes on tribal self-government and is therefore prohibited.

c) Whether the determination of the legal incidence of the state cigarette and sales excise taxes by the District Court was correct.

d) Whether the determination that the legal incidence of a state excise tax falls upon a non-member purchaser for purchases on land where the state has no criminal or civil jurisdiction over the Indian seller gives authority to the state to impose an obligation on the Indian seller to collect state excise taxes.

3. Whether a state that cannot enforce or administer its taxing system without judicial intervention, may constitutionally impose on persons not subject to its jurisdiction the obligation to collect and remit state excise taxes on sales of personal property.

4. Whether a state may unilaterally impose record keeping and reporting requirements on an Indian tribe

and/or its licensed Indian retailers making sales of personal property on trust lands within an Indian Reservation when the state has no civil or criminal jurisdiction over the tribe or Indian seller.

5. Whether a state has the non-judicial power to seize property of a sovereign Indian tribe in the possession of a common carrier in interstate commerce destined for an Indian reservation where the Indian tribe sells cigarettes to its members in an admitted state tax free transaction because its members have in the past sold the majority of the cigarettes purchased in such a tax free sale to non-members in sales the state claims are taxable to the non-members.

6. Whether a state may, without congressional or judicial authorization constitutionally enter a building of an Indian seller located on trust land within an established Indian Reservation, to enforce collection of state taxes imposed upon a non-Indian purchaser for sales occurring on lands where the state has no criminal or civil jurisdiction, and seize or levy on goods in the possession of the Indian seller and owned by the Indian seller.

SUMMARY OF ARGUMENT

The District Court's determination that a state may not impose upon an Indian Tribe and/or its licensed retailers the obligation to collect state excise taxes from non-member purchasers for sales on trust lands where

the state has no civil or criminal jurisdiction within an established Indian reservation over which the state has disclamed jurisdiction; rests comfortably on the "Worcester doctrine", *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, the "McClanahan principle", *McClanahan v. Arizona Tax Commission*, 411 U.S. 164, and the "Williams test." *Williams v. Lee*, 358 U.S. 217.

Absent permission by Congress, prohibition of such state intrusion into transactions taking place where the state has no criminal jurisdiction over an Indian seller is absolute even if the state would have jurisdiction over transactions in which only non-Indians are involved. Such transactions are within the *exclusive* jurisdiction of Congress and the tribal government whose right of self-government was reserved by treaty.

Under the "Worcester doctrine", the "McClanahan principle", and the "Williams test", any state intrusion into Indian-non-Indian transactions affecting Indians in areas where the state has no criminal or civil jurisdiction over the Indian involved, is a prohibited interference with the right of reservation Indians to make their own laws and to be ruled by them. Affirmance of the District Court's determination on these principles will establish the constitutional distinction between unlawful state intrusion into an area where the state has no criminal jurisdiction and lawful state intrusion into an area where Congress has authorized

criminal jurisdiction over Indians. Cf. *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463. Such an announcement would beneficially clarify standards regarding state-Indian relationships.

Even if state intrusion is not prohibited on the rationale of lack of jurisdiction over the Indians involved in the Indian-non-Indian transaction, the District Court's determination that Washington may impose upon an Indian tribe and/or its licensed retailers the obligation to collect state excise taxes from non-member purchasers rests comfortably on the "Williams test." The "Williams test" provides, absent governing Acts of Congress, that state action may not infringe on the rights of reservation Indians to make their own laws and be governed by them. In the instant case, the District Court has correctly determined that the Indian tribe had the power to tax and regulate the Indian-non-member transaction by tribal ordinance and that the "Williams test" pre-empted any state intrusion into the same transaction. Further, the District Court having determined that the imposition of an additional state tax on the sale would destroy the tribal enterprise, correctly determined that such impairment was prohibited by the "Williams test." These determinations are correct and are not in conflict with *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463. In *Moe*, there was no tribal enterprise; there was also

no tribal ordinance taxing and regulating the transaction. *Moe* had many other factual differences and does not control the instant case. In *Moe*, the state had criminal jurisdiction over the retailers. *Moe* should be limited in application to its facts.

Washington admits it does not have *judicial* power to seize cigarettes belonging to Yakima Indians in interstate commerce or from Indians as it lacks jurisdiction. However, Washington contends that it has non-judicial power to make such seizures.

Washington does not have the non-judicial power to seize property of a sovereign Indian tribe in the possession of a common carrier in interstate commerce destined for an established Indian reservation where the Indian tribe sells cigarettes to its members in an admitted state tax free transaction. Such a non-judicial seizure authorized by Washington statutes violates the Due Process Clause of the Fourteenth Amendment. The non-judicial determination of a state that a portion of the cigarettes previously sold to Indian retailers were resold to non-Indian purchasers in areas of the reservation over which Washington has no jurisdiction does not bring this non-judicial seizure within constitutional standards. *United States v. Mississippi Tax Commission*, 412 U.S. 363; *American Oil Co. v. Niell*, 380 U.S. 451.

Washington does not have the non-judicial power

under its statutes to enter into a building owned by an Indian on lands over which it has no civil or criminal jurisdiction for the purpose of seizing and selling property belonging to said Indian to enforce collection of state excise taxes previously imposed upon a non-Indian purchaser. Such a seizure is clearly prohibited by the Due Process Clause of the Fourteenth Amendment as it is a seizure in violation of the Fourth Amendment.

Washington's non-judicial tax collection scheme for the collection of taxes imposed on a non-Indian purchaser from Indians in areas without Washington's jurisdiction does not meet constitutional standards. As Washington's non-judicial collection scheme is unconstitutional and Washington admits it may not use state judicial power to collect these taxes; there is no obligation for the Indian seller to collect and remit the taxes imposed on a non-Indian purchaser. The absence of a constitutional non-judicial power of collection disposes of Washington's contention that there is an obligation on the Indians to collect and remit the tax. *McClanahan v. Arizona Tax Commission,* 411 U.S. 164, 178-79.

Washington may not impose its reporting and auditing requirements on persons over which it has no criminal and civil jurisdiction or constitutional powers of non-judicial collection. Washington has no criminal or civil jurisdiction over the Yakima Nation. The

Yakima Nation has common law immunity from suit. Washington does not have any applicable criminal or civil jurisdiction over Yakima Indians for transactions on trust lands within the Yakima Reservation. *Washington v. Yakima Indian Nation,* 58 L. Ed.2d 740. Washington cannot impose its reporting and auditing requirements on the Yakima Nation or its licensed retailers.

The District Court's determination that the legal incidence of the tobacco tax was on the Indian seller is correct. This Court should determine that the legal incidence of the other state excise taxes are also on the Indian seller. It is admitted that where the legal incidence of the state excise tax is on the Indian, that Washington may not collect its state excise taxes.

ARGUMENT

1. Under "Worcester Doctrine" and "McClanahan Principle", Washington's taxation scheme does not apply to sales by tribal Indians on trust lands within the Yakima Indian Reservation.

A discussion of the issues raised by Washington's appeal requires consideration of some basic concepts.

The District Court's determination rests comfortably on a conception of Indian tribes as self-governing Indian communities which retain inherent powers of self-government. The basic contours of this conception of Indian tribes as "domestic dependent nations" under the "protection" of the United States were first estab-

lished by Chief Justice Marshall writing for the Court in *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16-17 (1830). Chief Justice Marshall more fully developed this concept in *Worcester v. State of Georgia*, 31 U.S. (6 Pet.) 515, 559-562 (1832): "The Indian Nations have always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil. The very term 'nation' so generally applied to them means 'a people distinct from others.' The Constitution by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian Nations, and consequently admits their rank among those powers who are capable of making treaties . . . The whole intercourse between the United States and this Nation, is, by our constitution and laws, vested in the government of the United States."

At the time of European contact, Indian tribes and their governments were functioning as independent nations and were viewed and dealt with as such by European powers. They were recognized as having authority of their own (more commonly referred to as sovereignty) to manage their affairs within their territory *and with other nations*. Though Chief Justice Marshall's opinions are often considered to be the cornerstone of Indian sovereignty, these opinions had a limit-

ing effect on the inherent powers of an Indian tribe. However, these limitations were on the *external* powers of Indian tribes to deal with other nations and did not effect tribal powers within Indian reservations. Chief Justice Marshall stated that the Constitution "confers on Congress the powers of war and peace; of making treaties, and of regulating commerce . . . with the Indian tribes." "These powers," Justice Marshall said, "*comprehend all that is required* for the regulation of our intercourse with the Indians . . ."[2]

This was the law of the land at the time the Confederated Tribes and Bands of the Yakima Nation treated with the United States. The resulting *Treaty with the Yakimas*[3] clearly stated that the signatory fourteen tribes and bands "for the purposes of this treaty, are to be considered as one nation." Examination of the minutes of the treaty council shows that the executed treaty *explicitly* guaranteed that the Yakima Indians were to have "their own government" and were to have "their own laws." See: Treaty Minutes

[2] Emphasis supplied. *Worcester v. Georgia*, 31 U.S. (6 Pet. 515, 559 (1832).

Also see: *The Kansas Indians*, 72 U.S. (5 Wall.) 737, 755 (1867) regarding state power to tax tribal Indians:

> "If the tribal organization of the Shawnees is preserved intact, and recognized by the political department of the government as existing, then they are a 'people distinct from others,' capable of making treaties, separated from the jurisdiction of Kansas governed exclusively by the government of the Union. If under the control of Congress, *from necessity, there can be no divided authority.*" (Emphasis supplied).

[3] Executed on June 9, 1855. 12 Stat. 951, 2 Kappler 524.

accompanying *Treaty with the Yakimas*, filed in Docket 77-388.

Further, Article II, *Treaty with the Yakimas*[4] provided that the Yakima Indian Reservation was to be set apart for the exclusive use and benefit of the Yakimas and that no one except United States government personnel was to enter this reserved area without the permission of the Yakima Nation. This Court has explained the effect of this article: "*Implicit* in these treaty terms, . . . was the understanding that the internal affairs of the Indians remained *exclusively* within the jurisdiction of whatever tribal government exists.[5]

In 1978, Justice Stewart speaking for the Court, restated this concept of Indian tribes as self-governing political communities which retain inherent powers of sovereignty. *United States v. Wheeler*, 435 U.S. 313, 323 (1978): "In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status."

Washington agrees that the Yakima Indian Nation "is a soverign Indian Nation and Tribe established by treaty with the United States (12 Stat. 951) with a governing body duly recognized by the Secretary of the

[4] 12 Stat. 951, 2 Kappler 525. Appellant's Brief, App. 5a.

[5] First emphasis is this Courts. Second emphasis is your writers. *Williams v. Lee*, 358 U.S. 217, 221.

Interior of the United States of America."[6]

Washington agrees that the transactions involved are within the exterior boundaries of the Yakima Indian Reservation and the sales to non-members of the Yakima Nation takes place on allotted land held in trust by the United States.[7] Washington was admitted to the Union in 1889. The Enabling Act (Ch. 180, Laws of 1889, 25 Stat. 696) providing for the admission of the State of Washington (among other states) to the union, provided in Section 4 that Indian lands in the state of Washington, and therefore the Yakima Indian Reservation, should "remain under the absolute jurisdiction and control of the Congress of the United States, . . ." (Appellant's Brief App. 5a). Under this explicit mandate of the congressional Enabling Act, the people of Washington, through constitutional convention, incorporated this disclaimer of jurisdiction and control over Indian lands into Article XXVI of the Washington State Constitution in acceptance and in recognition of the *exclusive* federal nature of transactions within Indian Reservations located in the newly created State of Washington.

From the general concept of Indian tribes as self-governing Indian communities subject only to the *exclusive* control of Congress, this Court has evolved a

[6]. Pre-trial Order, hereafter "PTO", 5.2, A. 171.

[7] PTO 5.7, 5.8, A. 172-176.

principle regarding state taxation on Indian Reservations. Justice Brennan speaking for the Court has designated this principle: "The McClanahan principle."[8] This principle provides that state tax laws are not applicable to tribal Indians on an Indian Reservation except where Congress has *expressly* provided that State laws shall apply.[9] The foundation of this principle is the "plenary and *exclusive* power of the federal government to deal with Indian tribes . . . , and 'to regulate and protect the Indians and their property against *interference* even by a state. "[10]

When non-Indians are involved in reservation situations, this Court uses what Justice Thurgood Marshall speaking for the Court has designated the "Williams test."[11] This "test" was stated by Justice Black for this Court in *Williams v. Lee*, 358 U.S. 217 (1959). *Williams v. Lee*, held that state courts have no jurisdiction to hear a civil action brought by a non-Indian against a tribal Indian arising from a transaction on a reservation. The stated "test" was:

> "Essentially, absent governing Act of Congress, the question has always been whether the state action infringed on the rights of reservation Indians to make their own laws and to be ruled by them."[12]

[8] *Bryan v. Itasca County*, 426 U.S. 373, 376 n. 1 (1976).

[9] Id. Emphasis supplied.

[10] Id. Emphasis supplied.

[11] *McClanahan v. Arizona Tax Commission*, 441 U.S. 164, 179 (1973).

[12] Id.

For an understanding of the "test", the Court asks us to compare *Utah v. Northern R. Co. v. Fisher*, 116 U.S. 28 (1855). *Utah v. Northern R. Co. v. Fisher* involves an action brought by a non-Indian corporation which owned sixty-nine miles of railroad. A quarter mile of this railroad ran through the area designated by treaty as the Fort Hall Reservation. The non-Indian owner sought relief from territorial tax for this quarter mile of railroad. No Indian or tribal interests were involved and the right of way for this quarter of a mile had been ceded by the Indians to the United States. Also, this railroad had been constructed in this federal territory pursuant to an Act of Congress. The Court determined that even if the railroad were within the Fort Hall Reservation that there would be no relief for the non-Indian plaintiff as no "rights of the Indians *can* be impaired." (Emphasis added).

Justice Black for the *Williams v. Lee* Court further calls to our attention the principle that Congress has "acted consistently upon the assumption that the States have no power to regulate the affairs of Indians on a reservation," and clearly indicates that the Court believed that the extent of state intrusion into the affairs of reservation Indians is a matter for Congress alone.[13]

In view of this direction by the Court, it is appropriate that we examine the present policy of Congress re-

[13] *Williams v. Lee*, 358 U.S. 217, 221.

garding tribal self-government. This Court has noted the present focus of Congress towards "strengthening tribal self-government." *Bryan v. Itasca County*, 426 U.S. 373, 388 n. 14 (1976) and the possible destruction of tribal self-government "if tribal governments and reservation Indians were subordinated to the full panoply of civil regulatory power, including taxation, of state and local governments." *Bryan v. Itasca County*, 426 U.S. 373, 388 (1976).

This Court has also described the "Williams test" as prohibiting the exercise of the state's interest: (1) Where "the tribal self-government would be *affected.*" *McClanahan v. Arizona Tax Commission*, 411 U.S. 164, 179 (1973) (Emphasis supplied). (2) Where the burden "frustrates" tribal self-government, *Moe v. Salish and Kootenai Tribes*, 425 U.S. 463, 483 (1976). Justice Black's phrasing of the "Williams test" has also been repeated in *Fisher v. District Court*, 424 U.S. 382, 386-87 (1976) (per curiam) (dictum); *Kennerly v. District Court*, 400 U.S. 423, 426-27 (1971) (per curiam) (dictum); *McClanahan v. Arizona Tax Commission*, 411 U.S. 164, 179 (1972) (dictum).

We will hereafter discuss why the District Court's determinations are sustained by application of the "Williams test."[14] However, an initial inquiry into the necessity for such a discussion is appropriate. Applica-

[14] This brief pp.

tion of the "Williams test" is not necessary to uphold the District Court's judgment and restraint.

It is clear that in executing and ratifying the *Treaty with the Yakimas*, the United States and the Yakima Nation understood that the Yakima Reservation should be under *exclusive* tribal control. Subsequently, the state of Washington was created from a portion of Washington Territory and the already established Yakima Reservation was within the exterior boundaries of the newly created state. It was one of the requirements for admission to the Union and the people of the newly formed state expressly agreed, that the Yakima Reservation should be *exclusively* within the control of Congress.

The State of Washington is pre-empted by the Enabling Act (Ch. 180, Laws of 1889, 25 Stat. 696) from taxing transactions on Indian lands in the State of Washington in which Indians are in any way involved until Congress gives its permission. We believe that it would follow that *all* transactions are preempted by the "absolute control of Congress" were it

not for the "McBratney rule" involving transactions totally between non-Indians.[15]

If we return to the opinion in *William v. Lee*, we will see that the Court clearly intended that Congress should determine the area of state intrusion into Indian reservations if Indians were in any way involved. (358 U.S. at 221). Actions of Congress subsequent to *Williams v. Lee* manifest continued adherence by this Nation to the core of *Worcester v. Georgia*, 31 U.S. (6 Pet) 515 (1832). (Menominee Restoration Act of December 22, 1973, 87 Stat. 770; Indian Self-Determination and Education Assistance Act of January 4, 1974, 88 Stat. 2203. Indian Civil Rights Act of April 11, 1968, 82 Stat. 77, Indian Financing Act of 1974, 88 Stat. 77.) We further note that *Williams v. Lee* was announced in 1959 during a period in which state intrusion would probably have met with tacit Congressional approval. This Court has indicated that the federal courts should not be strained to implement this policy which Congress has now rejected. *Bryan v. Itasca County*, 425 U.S. 373, 389 n. 14.

[15] *United States v. McBratney*, 104 U.S. 621 (1882). The justification for this state extra-territorial jurisdiction over a non-Indian defendant (with a non-Indian victim) is often curiously stated. See: *Draper v. United States*, 164 U.S. 240 (1896) and *New York ex rel Ray v. Martin*, 326 U.S. 496 (1946). The "McBratney rule" is hard to harmonize with *Worcester v. Georgia, supra; United States v. Antelope*, 430 U.S. 641 (1977) and *Kennerly v. District Court*, 400 U.S. 423 (1971).

United States v. Mazurie, 419 U.S. 544 (1975) forecloses the application of the "McBratney rule" to *matters regarding commerce on Indian Reservations.*

This Court has by its decisions subsequent to *Williams v. Lee*, manifested continued adherence to the core of *Worcester v. Georgia* and the plenary power of Congress: *Washington v. Yakima Indian Nation*, ... U.S. ....., 58 L.Ed. 2d 740 (1979) (plenary power of Congress to determine reservation jurisdiction); *United States v. Wheeler*, 435 U.S. 313 (1978) (inherent tribal sovereignty), *Puyallup Tribe v. Washington Game Dept.*, 433 U.S. 165 (1977) (tribal sovereign immunity), *Delaware Business Council v. Weeks*, 430 U.S. 73 (1977) (plenary power of Congress); *Rosebud Sioux v. Kneip*, 430 U.S. 584 (1977) (plenary power of Congress to determine reservations); *United States v. Antelope*, 430 U.S. 641 (1977) (plenary power of Congress to determine jurisdiction); *Moe v. Salish and Kootenai Tribes*, 425 U.S. 463 (1976) (Supremacy Clause forbids state taxation of Indians); *Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649 (1976) (plenary power of Congress to determine distribution from Indian lands); *Bryan v. Itasca County*, 426 U.S. 373 (1976) (plenary power of Congress to determine area of state jurisdiction on reservations); *United States v. Mazurie*, 419 U.S. 544 (1975) (plenary power of Congress to regulate commerce on Indian reservations among non-Indians and to delegate authority to tribes); *Morton v. Mancari*, 417 U.S. 435 (1974) (Congressional Indian employ-

ment preference permissible to improve tribal self-government); *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974) (plenary power of Congress to determine validity of transfer of Indian lands to state); *Morton v. Ruiz*, 415 U.S. 199 (1974) (Fiduciary responsibility of federal government to Indians); *Fisher v. District Court*, 424 U.S. 482 (1976) (preemption of tribal ordinances over state courts regarding adoptions of reservation Indians); *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976) (plenary power of Congress to determine jurisdiction for adjudication of reservation water rights); *Antoine v. Washington*, 420 U.S. 194 (1975) (Congressional ratification of an agreement with an Indian Tribe binding on states); *DeCoteau v. District County Court*, 420 U.S. 425 (1975) (plenary power of Congress to determine area of reservation and relations therein); *United States v. Mason*, 412 U.S. 391 (1973) (federal fiduciary responsibility to Indians); *Mattz v. Arnett*, 412 U.S. 481 (1973) (plenary power of Congress to determine reservation); *McClanahan v. Arizona Tax Commission*, 411 U.S. 164 (1973) ("McClanahan principle"); *Mescalareo Apache Tribe v. Jones*, 411 U.S. 145 (1973) ("McClanahan principle" limited to reservations); *United States v. Jim*, 409 U.S. 80 (1972) (plenary power of Congress to determine distribution of income from Indian lands); *Kennerly v.*

District Court, 400 U.S. 423 (1971) (plenary power of Congress to control State-Indian relations); *Menominee Tribe v. United States*, 391 U.S. 404 (1968) (plenary power of Congress to abrogate treaty rights not to be lightly imputed to Congress); *Warren Trading Post v. Arizona Tax Commission*, 380 U.S. 685 (1965) (federal regulation pre-empts state taxation of a non-Indian reservation trader); *Seymour v. Superintendent*, 368 U.S. 351 (1962) (power of Congress to determine extent of and jurisdiction on Indian reservations); *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99 (1959) (plenary power of Congress over Indian lands).

Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) is saved from the above listing for separate discussion. In discussing this case we must note this Court's reliance on a concurring opinion in *Fletcher v. Peck*, 10 US (6 Cranch) 87, 147 (1810). Some discussion of the majority opinion in *Fletcher v. Peck* is in order. *Fletcher v. Peck* grew out of a famous scandal in Georgia politics: The Georgia legislators attempted to cancel the original land grants on the ground that the original Georgia legislators who had made the grants had been bribed. The land Georgia originally conveyed to defendant Peck's predecessor in interest was (at the time of the conveyance) held and occupied by several Indian tribes. (10 U.S. (6 Cranch) at 88, 142-43).

Plaintiff Fletcher argued that a 1763 proclamation by the King of England had confirmed full title to the subject lands in these tribes, thereby rendering Georgia incapable of transferring any interest in it. (Id. at 102, 117, 141-42). The Court held for the defendant on this issue (Id. at 142). However, that ruling did not determine the legal rights of Indians in land acquired after the American Revolution by the United States from Indians. Chief Justice John Marshall for the Court clearly indicated that the legal effect of this pre-revolutionary acquisition was "compromised" and that this "compromise is not now to be disturbed." (Id. at 142). Even regarding pre-revolutionary acquisitions, Marshall's opinion for the Court enunciated a compromise position: "The majority . . . is of opinion that the nature of the Indian title which is certainly to be respected by all courts, until it is legitimately extinguished, is not such as to be absolutely repugnant to seisen in fee on the part of the state." (Id. at 142-43). This compromise determination set the course of Marshall's later opinions more fully treating issues arising from United States-Indian relations. These later opinions have been considered the foundation of the "Worcester doctrine" that we have discussed and this doctrine forms the basis of United States-Indian relations regarding treaties executed after the formation of the

Union and in particular the *Treaty with the Yakimas.*[16]

However, before we leave *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810), we note that the Court held that the contract clause of the Constitution prevented Georgia from annulling land titles that had previously vested in good faith purchasers from the state's original grantees. We consider that an important holding that should be discussed. We believe this holding is apposite.

To show applicability, an initial inquiry must be directed to the existence of a contract in the instant case. No one denies that the State of Washington at the time of its admission to the Union expressly disclaimed jurisdiction over the Yakima Indian Reservation leaving affairs within this reservation under the "absolute jurisdiction and control of the Congress of the United States." Nor can it be denied that these promises were obtained by the United States in fulfillment of its fiduciary duty for the benefit of the Yakima Nation and its members. All elements of a contract are present. (17 Am. Jur 2d, *Contracts* §10).

We do not dispute that these promises may be more than a contract. In *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1941), the Court so determined:

"In carrying out its treaty promises with the Indian

[16] *Cherokee v. Georgia*, 30 U.S. (5 Pet.) 1 (1830) and *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832) were the law of the land at the time of the execution of the *Treaty with the Yakimas.*

tribes, the government is more than a contracting party."

Similarly, this Court has held the United States to the most exacting fiduciary standards in carrying out its treaty promises and imposes on the United States the obligation to act at all times with the Indians' best interests uppermost in mind. *Seminole Nation v. United States, supra; Chippewa Indians v. United States*, 301 U.S. 358, 375-76 (1937). The fact that the duty of the United States is higher than a contracting party, should not foreclose the United States from being considered a contracting party. The greater duty would logically include the lesser duty. While Congress possessing plenary power can direct a change, the State of Washington is forbidden by the Contract Clause from impairing this promise made for the benefit of the Yakima Indians. *Fletcher v. Peck, supra,* and *New Jersey v. Wilson*, 11 U.S. (7 Cranch) 164 (1812) support this conclusion.

We return to this Court's opinion in *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978). *Oliphant* determined that the Suquamish Indian Tribe, by submitting to the overriding sovereignty of the United States, gave up their power to try non-Indians in their Courts, *except in a manner acceptable to Congress.* We contend that Washington by agreeing that "Indian lands shall remain under the absolute jurisdiction and con-

trol of Congress" at the time of its admission, gave up their power to legislate regarding transactions on said Indian lands, *except in a manner acceptable to Congress. Oliphant* supports this contention.

An *explicit* Congressional grant of power to the state should be required to substantiate any state involvement on the Yakima Reservation. *Oliphant* recognizes Indian sovereignty "not *withdrawn* by treaty or statute, or by implication as a necessary result of their dependent status." *Oliphant* recognizes that Indian sovereignty over both their members and their territory was *reserved* by treaty. The tribal power is *reserved* by treaty and an explicit grant of power is not required.[17] On the other hand, any power of the state of Washington within the Yakima Reservation must be *granted* by Congress. No inherent power of the State of Washington was *reserved* as regards Indians or their territory at the time of Washington's admission to the Union. Washington could not reserve what it did not have. Its sovereign powers as a state were created by its admission to the Union and by the government of that Union. Further, as a condition to that admission, the people inhabiting the proposed state agreed that "Indian lands shall remain under the abso-

[17] *United States v. Winans*, 198 U.S. 371, 381 (1905) not only points out that treaty rights were *reserved* not *granted* rights but that these reserved rights survive the admission of a state (at 382). Likewise, it shows that rights of the state are granted rights (at 383).

lute control of Congress." Until Congress grants Washington power over Indians and their territory, none exists.

Unless this Court would adopt a "heads the state wins — tails, the Indians lose" principle, the lack of explicit federal grant of state power to Washington should determine this case on the other side of the *Oliphant* determination.

Congress has not only failed to grant the State of Washington any power to regulate or tax transactions between Indians and non-Indians on the Yakima Reservation, but Congress has further shown its intent that state taxing laws should not apply. In *Warren Trading Post v. Arizona Tax Commission*, 380 U.S. 685, 691 n. 18 (1965), the Court determined that the intention of Congress in passing and the Interior Department in interpreting the Buck Act[18] is that state power to levy sales or use taxes does not apply to Indian reservations. This case involved a non-Indian taxpayer. The Court however based its holding on the *additional* ground of federal pre-emption by reason of federal

[18] The Buck Act, codified by Act of July 30, 1947 (61 Stat. 641) 4 USC §§105-110. The Buck Act was originally passed by the Senate on September 30, 1940 and by the House on October 1, 1940. As the Supreme Court of Idaho points out in *Mahoney v. State Tax Commission*, 96 Idaho 59, 524 P.2d 187, 192-93 (1974), Congress must have known of the May 1940 (57 I.D. 129, 140-141) opinion of the Solicitor of the Interior Department ruling against a state tax on the selling of tobacco products by Indians on the Menominee Reservation to "the general public" when Congress excepted Indians from state excise taxation in federal areas. (4 USC §109). See also: *Valandra v. Videt*, S.D. 259 N.W. 2d (1977).

regulation pursuant to the Indian Traders Act.

We submit that under the foregoing reasoning and authority, that the State of Washington has no power to tax transactions involving tribal Indians on trust land within the Yakima Reservation. We further submit that this determination can be made without the *additional* ground of violation of the "Williams test" by reason of state taxes being destructive of tribal enterprise and pre-emption of the area by tribal ordinance.[19] Such a determination is within the jurisdiction

[19] The Yakima case is an appeal involving *jurisdiction* not *taxation* and the "McClanahan principle", not the "Williams test". We derive this distinction from this Court's instructions in *Tonasket v. Washington*, 411 U.S. 951 (1973) (per curiam) vacating a judgment of the Washington Supreme Court in *Tonasket v. State*, 79 Wash. 2d 607, 488 P. 2d 281 (1971), herein called "Tonasket I." In vacating the Washington judgment, obligating an Indian retailer to collect the Washington cigarette tax for the on-reservation sale of cigarettes to non-Indians, this Court ordered the Supreme Court to reconsider its decision in light of "§§6 and 7 of C. 157, 1972 Extraordinary Session Laws of the State of Washington and this court's decision in *McClanahan v. Arizona Tax Commission*" decided twenty-eight days previously by this Court. On remand, the Washington State Supreme Court held that §§6 and 7 of C. 157, 1972 Extraordinary Session Laws of the State of Washington exempt Indian retailers from the obligation to collect state cigarette excise tax on his sales to non-Indians and that he was authorized to possess unstamped cigarettes. Application of the McClanahan principle was therefore not required to sustain the Indian retailers non-taxability. *Tonasket v. State*, 84 Wn. 2d 164 (1974) herein called "Tonasket II."

In *Tonasket II*, the Colville tribe was described as a tribe that had petitioned for *full* jurisdiction under Section 5, Chapter 36, 1963 Washington Laws (R.C.W. 37.12.021). Appeal of *Tonasket II* to this Court was denied for lack of federal question. 420 U.S. 915. The Yakima jurisdiction status is different from the Colville tribe. The Yakima Nation has not petitioned for state jurisdiction and Washington has no civil or criminal jurisdiction over the transactions involved in this appeal. *Washington v. Yakima Nation*, 58 L. Ed. 2d 740, 753 N. 18.

If the state had jurisdiction then the "Williams test" would apply. Until then, the "McClanahan principle" should control. See excellent discussion in *Mahoney v. State Tax Commission*, 96 Idaho 59, 524 P. 2d 187 (1974).

of this Court and the scope of this review. *Dandridge v. Williams*, 397 U.S. 477 (1970).

2. District Court's determination supported by "Williams Test". *Moe v. Confederated Salish and Kootenai Tribes* not controlling.

The preference of your writer to hold to the "Worcester doctrine" and the "McClanahan principle", until Congress explicitly and specifically speaks in state-Indian relationships, is based on the desire for manageable standards in these matters. The Yakima Nation's commitment to the "McClanahan principle" is based on the desire to clearly sustain their right of self-government without having to show economic loss or gain. Profit is really not the point in my client's eyes. The powers of self-government within the exterior boundaries of the Yakima Reservation have been reserved and have not been modified by Congress. Washington's claim that the Yakima Nation is merely marketing a tax advantage, when they regulate their own retailers by their own laws, is most offensive. With large cigarette excise taxes, Washington could make this claim against every other sovereign in the United States, particularly Oregon. Industries and trade are attracted thru tax advantages by our Nation's separate sovereigns every day. Washington itself advertises for industry based on the attraction of low ad valorem taxes and lack of income tax, but we do not suggest

that this has any effect on their sovereignty. That this statement about marketing a tax advantage is made and that Washington believes that this rhetoric will be effective before this Court, speaks volumes. The principles of reserved self-government — not rhetoric — should determine this appeal.

However, this Court may prefer to determine this appeal under the judicial "Williams test." If so, we suggest that the District Court's determination that a state's intrusion may be limited by tribal pre-emption has considerable merit. Tribal pre-emption, as determined by the District Court, is limited to areas where a tribe has retained inherent tribal powers.

At the very beginning of this discussion, your writer wishes to make it clear that the Yakima Indian nation does not propose any tribal pre-emption of state application of any of its laws outside of the exterior boundaries of the Yakima Indian Reservation. In this case we specifically defer to the state taxation of any personal property in the possession of non-Indians *outside* of the exterior boundaries of the Yakima Indian Reservation. The fact that the sale is non-taxable where it is made does not impair state taxation for the use or possession of the property by the user in non-reservation areas of the state of Washington. Just as Washington taxes the use of goods brought from Oregon or other states outside their jurisdiction by resi-

dents of non-reservation areas, so does the State have power to tax the use by these same residents outside the Yakima Reservation. It is where the State reaches into areas where it has no jurisdiction to impress the collection of the tax on those not within its jurisdiction, that the law of this land prohibits such state intrusion.

It may be easier and politically more attractive for Washington to impose its unilateral will on a discrete and insular, politically impotent minority, than to enforce its laws by seizure and penalty directed towards members of a dominant politically active group. However, we suggest that this should not effect this Court's decision. If Indians not subject to state jurisdiction are to be made tax collectors to assist the State in its political tax collection problems, we suggest that Congress—rather than this Court—should make this decision. Indeed, the Court in *Williams v. Lee*, 358 U.S. 217, 223 (1958) has suggested that this is the state's only solution. We suggest that there is another, i.e., a state-tribal negotiated reservation wide joint taxing and sharing system. Tribal efforts in this regard have been rejected and are not a part of this determination.

As later discussed, the Yakima Nation has the clear power to tax transactions of non-Indians within the exterior boundaries of the Yakima Indian Nation. The Yakima Nation, as a policy matter, has limited this sovereign power to basic transactions between Indians and

non-Indians, such as the tribal tax on sales of cigarettes and tobacco to non-Indians and taxes on the lease of Indian land. The Yakima Nation fully realizes that governmental entities must receive income to provide services and has therefore severely limited the exercise of its sovereign power of taxation to transactions involving Indian retailers. Both sales to Indians and non-Indians are taxed. However, this policy determination should not be interpreted as a lack of power to tax all transactions within the reservation unless prohibited by an authorized Act of Congress.

The Yakima Nation has a governmental function within the exterior boundaries of the Yakima Reservation and must have income to provide basic governmental services to both Indians and non-Indians. This governmental duty and burden is a substantial one and requires the expenditure of millions of dollars of tribal funds. In the main, the cost of these governmental services to Indians and non-Indians is supported directly by funds derived from tribal operations such as its cigarette enterprise. Where the Yakima Nation establishes a business off the Yakima Reservation, such as its aircraft enterprise, it pays all taxes to the State of Washington. This is true even though the funds used to pay taxes would assist tribal self-government. The converse, however, is not true. When the State of Washington runs a business such as its state liquor stores on

the reservation, it makes no provision for any of the income to flow to the Yakima Nation. This is true in spite of the obvious burden the sale of liquor places on the sovereign law and order function of the Yakima Nation.

Let us now discuss the sovereign power of the Yakima Nation to tax Indians and non-Indians on the Yakima Reservation. The Yakima Nation was federally established by *Treaty With the Yakimas* (12 Stat. 951). In Article II of the *Treaty With the Yakimas*, the Yakima Reservation was reserved for the *exclusive* use of the Yakima Nation and no one was to reside thereon without the permission of the Yakima Nation. This sovereign right to exclude non-members is still retained. The Yakima Nation and its governing bodies are recognized by the United States of America. An important attribute of that sovereignty is the power to levy taxes on both tribal members and non-tribal members.

Felix S. Cohen in *Handbook of Federal Indian Law*, (1942) has written:

> "One of the powers essential to the maintenance of any government is the power to levy taxes. This power is an inherent attribute of tribal sovereignty which continues unless withdrawn or limited by treaty or by act of Congress is a proposition which has never been successfully disputed." (F. S. Cohen, *Handbook of Indian Law* (1942) citing *Buster v. Wright*, 135 F. (8th Cir. 1905), Appeal dismissed 203 U.S. 599; and *Morris v. Hitchcock*, 194 U.S. 384, (1904).

That is to say, the tribal power to levy taxes does not find its source in the sovereign power of the United States, and is derived from the inherent sovereignty of the Indian tribe. Also, the Yakima Nation as previously discussed, was promised the right to be governed by its own laws. Tax laws are a part of such laws.

Thus, in *Maxey v. Wright* (3 Ind.T. 243, 54 S.W. 807, affirmed 105 F. 1003) decided in 1900, the Court of Appeals of Indian Territory held that under the Creek Indian Treaty of 1856, guaranteeing the Creeks the right of self-government and the power to exclude non-members, a non-Indian attorney was required to pay an annual occupation tax of twenty-five dollars levied by the Creek Nation.

The principles identified in these early cases were discussed by the Eighth Circuit Court of Appeals in *Iron Crow v. Oglala Sioux Tribe of the Pine Ridge Reservation*, 231 F. 2d 89 (8th Cir. 1956). Attention is invited to the Court of Appeal's reasoning. In *Iron Crow*, the plaintiff, an enrolled member of the Oglala Sioux Tribe and possessing allotted trust lands on the Pine Ridge Reservation, leased to non-members of the tribe, sought to enjoin the tribe from levying a tax against his *non-member* lessee for the privilege of grazing stock upon land located within the reservation. After finding inherent tribal sovereignty, the *Iron Crow* Court then addressed the question of whether this

Indian tribe had power and authority to levy taxes on *non-Indian* citizens of the United States and the State of South Dakota, (pages 98-99):

> "A similar question was presented to this court in *Buster v. Wright*, 8 Cir. 1905, 135 F. 947, appeal dismissed 203 U.S. 599, 27 S. Ct., 777, 51 L. Ed. 334. That case involved the validity of a permit tax on the Creek Nation for the privilege which it offered to those who were not citizens of its nation or trading within its borders. In upholding the right of the Creek Nation to enforce the tax, Judge Walter H. Sanborn, speaking for the court, said, 134 F. at page 950:
>
> 'The authority of the Creek Nation to prescribe the terms upon which non-citizens may transact business within its borders did not have its origin in act of Congress, treaty or agreement of the United States. It was one of the inherent and essential attributes of its original sovereignty. It was a natural right of that people, indispensible to its autonomy as a distinct tribe or nation, and it must remain an attribute of its government until by the agreement of the nation itself or by the superior power of the republic it is taken from it.
>
> 'Originally an independent tribe, the superior power of the republic early reduced this Indian people to a 'domestic, dependent nation' *(Cherokee Nation v. State of Georgia*, 5 Pet. 1-20, 8 L.Ed. 25), yet left it a distinct political entity, clothed with ample authority to govern its inhabitants and to manage its domestic affairs through officers of its own selection, who under a Constitution modeled after that of the United States, exercised legislative, executive, and judicial functions within its territorial jurisdiction for more than half a century.'
>
> "We approve of the statement in Cohen's *Handbook of Federal Indian Law*, page 142, as follows:

> 'One of the powers essential to the maintenance of any government is the power to levy taxes. That this power is an inherent attribute of tribal sovereignty which continues unless withtdrawn or limited by treaty or by act of Congress is a proposition which has never been successfully disputed.' (Citing *Buster v. Wright, supra*, and *Morris v. Hitchcock*, 1903, 21 App. D.C. 565 affirmed 194 U.S. 384, 24 S. Ct., 712, 48 L. Ed., 1030).
>
> "Inasmuch as it has never been taken from it, the defendant Oglala Sioux Tribe possesses the power of taxation which is an inherent incident of its sovereignty. The tribe has seen fit to give orderly implementation to that power through the adoption of a constitution which, among other things, has specifically provided for the levy of taxes. Such action was taken in accordance with the provisions of the Indian Reorganization Act, 1934, 48 Stat. 987, 25 U.S.C.A. §476."
>
> "We conclude from the original precept of tribal sovereignty and the fact that the power of the Oglala Sioux Tribe to impose the tax or license in question has not been pretermitted by any federal statute or agency ruling thereunder, but to the contrary, has been implemented by the Indian Reorganization Act, supra, that such power still exists."

See also the reasoning in *Barta v. Oglala Sioux Tribe*, 259 F.2d 553. (Eighth Circuit 1958). *Idaho State Tax Commission v. Mahoney*, 524 P. 2d 187 (Idaho, 1974), and 55 I.D. at pp. 46-48.

The reasoning in these cases supports the power of the Yakima Nation to tax sales to non-Indians by the Yakima Nation's licensees operating on Indian trust lands within the exterior boundaries of the Yakima Indian Nation.

Since *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976) deals with state taxation of sales of cigarettes by Indians to non-Indians, it is appropriate that we discuss the difference between the facts in *Moe* and the instant case. A table would appear to be the best way to illustrate the differences:

Elements in Moe	**Elements on Yakima Reservation**
State scheme required pre-collection of tax at time of sale by distributor (presumably non-Indian, off-reservation). 425 U.S. 145 at 467 n 6.	State scheme requires collection only upon sale to non-Indian on trust land, on reservation. Imposes duty to place stamps on retailer. A. 214.
State scheme required registration for fee which court held improper. Id. at 480.	State scheme requires registration without fee and extensive record keeping and verification of sales that are not taxable to members or within state power. A. 214, 217.
State's enforcement limited to criminal prosecution of seller for selling unstamped cigarettes. Id. at 482.	State claims entire civil and criminal enforcement powers as provided in state statutes. A. 195.
No finding that cigarettes are distributed by tribal distributor and purchased by retailers with income to tribe. Id.	Cigarettes purchased from tribal enterprise bringing employment and income to tribe. A. 177.
No finding of tribal regulation of cigarette sales.	Extensive tribal regulation providing for

Elements in Moe	**Elements on Yakima Reservation**
The cigarettes are sold by private business ventures who lease land from tribe and pay a small administrative fee but there is no tribal regulation or income based on volume. Id.	location, total employment of tribal members and pricing. A. 201-211.
No showing of tribal tax. Id.	Tribal tax. For six years tribe has taxed all retail sales by licensed retailers and from fees and mark-up generates approximately $225,000 a year for tribal purposes. A. 177.
The State had criminal jurisdiction over retailers. Id. 467.	The State has no applicable civil or criminal jurisdiction over tribe, or retailers on trust property on reservation where sales are made. *Washington v. Yakima Nation, supra.*
No showing of tribal benefit from sales. Id.	Tribal benefit in employment of members, income from mark-up, and tax income above set forth. A. 177-182.
There was no dispute that tax on non-Indians was lawful. Parties agreed to this. Id. at 483.	Tribe disputes that there is any tax due from non-Indians until they are at a situs where the states power may attach. No state power at sales situs where state attempts to impose tax. A. 190-194.

Elements in Moe	Elements on Yakima Reservation
First incidence of tax on distributor who had duty to place stamps. Direct tax on consumer. Retailer had duty to pre-collect tax. Id. at 482.	First incidence on any possession, etc., and on retailer to collect at time of sale. A. 215. See discussion this Brief, *infra.*
No finding that tax would hurt retailers. Id.	Determination that tax will destroy retailers and severely limit tribal income and employment. J. S. App. 35.
State had scheme of enforcement that did not entail seizure of Indian property on reservation. Id. at 482.	State scheme entails unconstitutional seizure on reservation. Discussion this Brief, *infra.*
No showing that tribe promised to be able to live under own laws. Id.	Treaty promises that Yakimas would live under own laws and would be free from outside interference. This Brief *supra.*

We believe that a comparison of the above factors will show the *Moe*, supra, is supportive of the Yakima Nation's position.

We would next like to discuss the problem of double taxation and the tribe's pre-emption even if the State had power to tax the transaction between Indian and non-Indian. The Yakima Nation is already taxing each sale of cigarettes by its licensees in the amount of two and one-half cents per pack. This is true regardless of whether the purchaser is Indian or non-Indian.

As discussed above, this power clearly exists in the Yakima Nation. The Yakima Nation was established by treaty as a distinct independent political community on a reservation reserved for its exclusive use with the power to tax transactions on its reservation. The supremacy principle will control a conflict between state law and a treaty right. The supremacy principle applies to state taxation. *Scandinavian Airlines System, Inc. v .County of Los Angeles*, 56 Cal. 2d., 11, 363, P.2d 25. Cert denied. 368 U.S. 899. Based on this supremacy principle, the Yakima Nation's sovereign right to tax these transactions between Indian and non-Indian on trust property within its reservation where the State has no jurisdiction, must prevail.

In summary, this appeal does not concern itself with the taxation of transactions among non-Indians, or transactions outside the reservation, or even transactions with non-Indians on non-trust lands within the reservation. What this appeal does involve is the impression of the obligation on tribal Indians to collect and remit state taxes levied on non-Indian — Indian on-reservation transactions on lands not within Washington's jurisdiction. The impression of this obligation will in the uncontested determination of the District Court destroy both the tribal regulatory scheme and the tribal enterprise. It is noted that the ordinance and the tribal enterprise have been approved by the applic-

able federal authority. It would be hard to find a better set of circumstances that calls for the restraint of state action under the "Williams test". *Moe v. Salish and Kootenai Tribes*, 425 U.S. 463, should be limited to its facts. This is an appropriate place for the words of Justice Holmes:

> "The power to tax is not the power to destroy while this Court sits." (227 U.S. at 223).

3. Washington may neither seize cigarettes destined for the Yakima Nation in interstate commerce as contraband or seize personal property on trust lands outside Washington's jurisdiction. This lack of state power of judicial administration or constitutional non-judicial administration disposes of the case.

As part of the "McClanahan principle" this Court has announced in *McClanahan v. Arizona Tax Commission*, 411 U.S. 164, 178-79 (1973) that:

> "Unless the State is willing to defend the position that it may constitutionally administer its tax system without judicial intervention, . . . the admitted absence of either civil or criminal jurisdiction would seem to dispose of the case."

Washington does not have criminal or civil jurisdiction over the Yakima Nation or its members for the concerned transactions on trust or restricted lands. *Washington v. Yakima Indian Nation*, ... U.S. ....., 58 L.Ed. 740 (1979). It is admitted that the retailers are all enrolled members of the Yakima Nation and that these retailers transact business on allotted land held in trust by the United States for individual Indians

or by restricted deed to individual Indians. (Appellant's Brief, p. 16).

Washington contends that it may constitutionally administer its tax system *without* judicial intervention.[20] While Washington agrees that it may not lawfully assess a tax against the Yakima Nation derived from its wholesale distribution of cigarettes to its licensed members and cannot therefore attempt to collect these taxes by its past method of summary distraint procedure (Appellant's Brief, p. 18 n. 8), Washington contends that it may seize and sell unstamped cigarettes being delivered to the Yakima Nation in interstate commerce without any judicial proceedings or even an administrative warrant. The basis for this summary action is a unilateral ex parte administrative determination that a portion of these cigarettes — admittedly lawfully sold as exempt from cigarette or other state excise taxes to tribal members — may or will be resold to non-Indian purchasers on trust lands in the Yakima Indian Reservation by tribal retailers. Washington

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[20] Appellant's Brief p. 103. Washington recognizes that it has no jurisdiction over the Yakima Nation or its members. Even if it had jurisdiction over the Yakima Nation, the Yakima Nation is immune from legal action. *Puyallup Tribe v. Washington Game Department*, 443 U.S. 165, 172-173 (1977); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978); *North Sea Products v. Clipper Seafoods*, 92 Wn. 2d 236, . . . P. 2d . . ., (1979).

Technically, the enforcement issue is not in controversy as the District Court held that there was no taxes due. The District Court's restraint prohibiting Washington from seizing or confiscating cigarettes belonging to the Yakima Nation or its members was based on that determination. However, the enforcement issue has relevancy as to whether the tax is due as we herein discuss and the question of jurisdiction is not raised by this appellee.

contends that this procedure meets the requirements of the Due Process Clause of the Fourteenth Amendment. The State's position is untenable.[21] The State claims that it can lawfully require stamps to be affixed to cigarettes prior to shipment to the Yakima Nation and if stamps are not affixed, those cigarettes are subject to being seized as contraband. By maintaining that position, Washington substantiates our contention — that the first legal incidence of the tax falls upon the Yakima Nation or its licensed retailers. However, the state recognizes that if the first legal incidence of the tax is on the Yakima Nation or its licensed retailers, it is invalid under *McClanahan*. Washington attempts to avoid such a result by asserting that the first legal incidence of the tax falls on the non-Indian purchaser of the cigarettes and that the tax is not due until the sale is made to the non-Indian purchaser. If this assertion is assumed to be correct, then it is clear that no tax has become due while the cigarettes are in transit. To seize unstamped cigarettes before any tax is due and owing would be a clear violation of the Due Process Clause of the Fourteenth Amendment. Therefore, it is clear that regardless of whom is to bear the first legal incidence of the tax, the Yakima Tribe or its licensed retailers, or the non-Indian purchaser, Washington cannot seize unstamped cigarettes being shipped to or by the Yakima

[21] The State's enforcement scheme is without "process" let alone "due process."

Nation without violating the Due Process Clause of the Fourteenth Amendment and without impermissibly interfering with interstate commerce. Contrary to Washington's statement[22] we most certainly do claim that the procedures used by the State in seizing and selling unstamped cigarettes violates the Due Process Clause of the Fourteenth Amendment. While the State may burden an interstate shipment by regulations requiring adequate information to determine where the cigarettes are going, the cases are clear that under the Commerce Clause and the Due Process Clause, that the state may not use its regulatory or police powers to seize or sell cigarettes where the consignee is located in an area where the state does not have jurisdiction. In the following cases, state courts have held that where the unstamped cigarettes were in transit to areas where the state lacked jurisdiction, they were not subject to tax by the state and further, were not subject to penalties, forfeitures, seizure or other regulatory powers even though the cigarettes were unstamped. *Pfeiffler v. State*, 226 Ark. 825, 295 S.W. 2d 365 (1956); *Neeld v. Giroux*, 224 N. J. 224, 131 A. 2d 508 (1957); *State v. 483 Cases*, 98 N.H. 180, 96 A. 2d 568 (1953).

The state cases cited by Washington are inapposite.[23] In each of those cases the cigarettes were destined to areas where the state had jurisdiction and the cigar-

[22] Appellant's Brief p. 104.

[23] Appellant's Brief p. 105.

ettes were to become part of the state's goods. *State v. Sedacca*, 252 Md. 207, 249 A.2d 456 (1969); *Angelica Co. v. Goodman*, 52 Misc. 2d 844, 276 N.Y. Supp. 2d 766 (1966); *People v. Asta*, 337 Mich. 590, 60 N.W. 2d 472 (1953); *Commonwealth v. Flickinger*, 165 Pa. Super. 95, 67 A.2d 779 (1949) *aff'd* 364 Pa. 59, 73 A.2d 652 (1950), *cert. denied* 340 U.S. 843 (1950); *People v. Locriccho*, 342 Mich. 210, 69 N.W. 2d 723 (1955).

Likewise, Washington incorrectly cites *Organized Village of Kake v. Egan*, 339 U.S. 60 (1962) as authority for the proposition that Indian reservations are within the territorial jurisdiction of the state in which they are located. This is clearly incorrect. See: *Warren Trading Post v. Arizona Tax Commission*, 380 U.S. 685 (1965); *Williams v. Lee*, 358 U.S. 217 (1959); *McClanahan v. Arizona Tax Commission*, 411 U.S. 164 (1973). *Organized Village of Kake v. Egan, supra*, was clearly distinguished by the Court within the corners of the Court's opinion. Organized Village of Kake, did not have a reservation or treaty. This Court pointed out the difference between the *Kake* situation and a situation where a recognized reservation had been established. After citing the case of *Metletakla Indian Community v .Egan*, 369 U.S. 45, 62 (1961), the Court said:

> "The situation here differs from that of the Metletakla Indian Community in that neither Kake or Angoon has been provided with a reservation . . ."

Further, we would argue that the Washington cited cases of *Morrow v. Henneferd*, 182 Wn. 625, 47 P.2d 1016 (1935), *Rainier National Park Co. v. Martin*, 18 F. Supp. 581, on rehearing 23 F. Supp. 60 (W.D. Wash. (1937), affirmed 302 U.S. 661 (1938), and *Sherman-Reynolds, Inc. v. Mahin*, 47 Ill. 2d 323, 265 N.E. 2d 640 (1970), stand for the proposition that state power to require sellers to collect excise taxes from purchasers is based on state police or regulatory power and not upon the power to tax. The Supreme Court of Washington clearly says that in *Morrow*, at page 633:

> "Power to require collection rests on power of regulation."

In *Sherman-Reynolds*, the Supreme Court of Illinois similarly said at page 642:

> "[T]he legislative authority to enact Article 7, rests, not with its power to tax as intimated by defendants, but on the police power."

These cases support our position, not Washington's. It is agreed by everyone that the state does not have the power to tax the Yakima Nation or its members on the reservation. Likewise, since there is no power to tax the Yakima Nation or Yakima Indians as regards transactions that take place on trust property, the State has no police power or regulatory power or jurisdiction over transactions that take place upon that property.[24] As a general rule, a requirement that a

[24] Both the power to tax and the power to regulate should exist together to satisfy constitutional standards. In the instant case, Washington does not have jurisdiction to sustain either the power to regulate or the power to tax tribal Indians.

seller of goods collect a sales or use tax from a purchaser, where it is clear that the taxing state has power over both purchaser and seller and the transaction involved, there is no violation of due process. However, the other side of the proposition is just as well established. *Miller Brothers Co. v. Maryland*, 347 U.S. 340, rehearing denied 347 U.S. 964 (1954).

In *Miller*, the Supreme Court clearly held that the Due Process Clause of the 14th Amendment requires some definite link and connection between a state and the person, property or transaction that it seeks to regulate and the state's power is limited to areas within its jurisdiction. No such connection or jurisdiction existed in *Miller* and such a connection is non-existent in the present case.

Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463 (1976) is likewise distinguished. Since the state had jurisdiction over criminal offenses over the area involved in *Moe*, the state had power to arrest Indian retailers who violated the state criminal statute prohibiting the sale of non-stamped cigarettes. Accordingly, the Supreme Court held that an injunction prohibiting the arrest of Indian retailers would not lie. That is all *Moe* has said and it is clearly distinguishable from the present case because Washington has no criminal or civil jurisdiction over the Indian person, property or transaction it seeks to regulate.

Because *Rainier National Park v. Martin*, 18 F. Supp. 481, on rehearing 23 Fed. Supp. (W.D. WWash. 1937), affirmed 302 U.S. 661 (1968), involved a federal area in our state, it might be well to point out that the material facts therein are different from those in the present case. In *Rainier*, the state expressly *reserved* the right to tax and to collect and enforce the tax in the conveyance to the United States. In the instant case, Washington could not *reserve* any such rights insomuch as it was not a state when the Yakima Reservation was reserved. There was no grant to Washington, and Washington absolutely waived jurisdiction over the Yakima Reservation when it became a state.

Washington's cited case of *Carter v. Commonwealth of Virginia*, 321 U.S. 131 (1944) is likewise inapposite. This case does lead us to cases that are apposite. Before discussing these cases, it would be appropriate to point out that we are not discussing the rule of this Court that the federal and state governments may resort to summary procedures to minimize a taxpayer's opportunity to waste assets in anticipation of a collection attempt. *Phillips v. Commissioner of Internal Revenue*, 283 U.S. 598 (1931). First, there is admittedly no tax due from the Yakima Nation, consignee of the transported cigarettes. Secondly, R.C.W. 82.24.130 directs itself to the seizure of goods unilaterally deemed "contraband" by the terms of the state statute and has no

direct relation to the collection of revenue.[25] Thirdly, the sales by the Yakima Nation to tribal members are admittedly non-taxable and Washington statutes provide no exceptions for such lawful non-taxable sales from the imposition of its contraband statute and clearly violate the Due Process Clause of the Fourteenth Amendment.

With those preliminary remarks, we now discuss this Court's rulings that we consider controlling. Seizure or taxation of liquor, generally prohibited or taxed by a state within its borders, is not constitutionally permitted where the liquor is consigned to a consignee federally authorized to possess and sell said liquor within an exclusive federal area. *United States v. Mississippi Tax Commission*, 412 U.S. 363 (1973); *Johnson v. Yellow Cab Transit Co.*, 321 U.S. 383 (1944). See also: *Hostetler v. Idewild Liquor Corp.*, 377 U.S. 324 (1964); *Heublein v. South Carolina Tax Commission*, 409 U.S. 275 (1972). This rule applies even if the liquor sold in the federal area is consumed outside of the federal area. *United States v. Mississippi*, supra.

Furthermore, the seizure is contrary to the Due Process Clause of the Fourteenth Amendment. *American Oil Co. v. Neill*, 380 U.S. 451 (1965). In *American*

[25] As long as Indian organizations are recognized as tribes by the United States, Congress is the one to determine what articles of "commerce" are "contraband." *Perrin v. United States*, 232 U.S. 478 (1914); *Tinker v. Midland*, 231 U.S. 681 (1914); *Dick v. United States*, 208 U.S. 340 (1908); *United States v. Laiviere*, 98 U.S. 188 (1876).

Oil Co. v. Neill, plaintiff, a licensed Idaho gasoline dealer, sold gasoline under a contract executed outside of the State of Idaho. He delivered the gasoline from a point outside of Idaho to the purchaser in Idaho by means of a common carrier. The purchaser thereafter used the gasoline in Idaho. Idaho statutes provided that a tax of six cents per gallon was due from the plaintiff dealer in such circumstances. The Court, speaking through Chief Justice Warren held that the purported imposition of the tax on the plaintiff was a violation of the Due Process Clause of the Fourteenth Amendment. That the gasoline imported was clearly intended to be used in the State of Idaho and the seller was a licensed Idaho dealer, was held to be insufficient considerations to uphold the tax.

Washington further contends that it may enter the Yakima Indian Reservation, go onto trust lands where they have no jurisdiction, enter buildings owned by the tribal retailers and seize unstamped cigarettes and sell them as contraband. All of this without judicial authorization. This contention is so far from the guarantees of exclusion from the Yakima Reservation contained in the *Treaty with the Yakimas* and the guarantees against illegal search and seizure contained in the Fourteenth Amendment, that it is predictable that no authority can be found in this regard. The Fourth Amendment binds the State of Washington under the

Due Process Clause of the Fourteenth Amendment. *Moss v. Ohio*, 367 U.S. 643 (1961).

Washington's further contention that it may criminally prosecute tribal retailers for a state defined crime on a portion of the Yakima Reservation where they have no criminal jurisdiction is likewise not sustained. *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976), does not sustain Washington's contention. In *Moe*, Montana had criminal jurisdiction over the retailers and this sustained Montanas only remedy, i.e. arrest of sellers not collecting the tax. Here Washington has no criminal jurisdiction that would sustain such an arrest. *Washington v. Yakima Indian Nation*, ..., U.S. ....., 58 L. Ed. 2d 740 (1979).

Failing to sustain Washington's power to constitutionally administer its tax system without judicial intervention, the system of administration is void against the Yakima Indians.[26] Further, the failure to sustain constitutional administration, will likewise dispose of the applicability of Washington's taxes. *McClanahan v. Arizona Tax Commission*, 411 U.S. 164, 178-79 (1973).

[26] Lack of jurisdiction over the Yakima Nation and its members in the operation of their businesses, and the sovereign immunity of the Yakima Nation, should clearly dispose of *any* state reporting and auditing requirements.

4. Legal incidence of state taxing scheme falls on tribal Indians.

The Yakima Nation does not agree with the District Court's determination that legal incidence of the State of Washington excise taxes falls on a non-tribal purchaser.

Under the District Court's determination, the question of legal incidence of the tax under Washington's cigarette taxing scheme was immaterial as the District Court held the cigarette taxing scheme had been preempted by tribal ordinance and constituted an unreasonable interference with tribal self-government. It is agreed that if the legal incidence of a tax is on the Indian or a tribe, the "McClanahan principle" would make the tax void, and it would not be necessary to consider the District Court's determination of the applicability of the "Williams test" and tribal pre-emption. A discussion of the question of whether a legal incidence of the various tax excise taxes fall on the tribe or tribal Indian is therefore appropriate.

The legal incidence of the state cigarette taxing scheme does fall on the Indian or Indian tribe. The determination of where the legal incidence falls is a federal question.[27] Washington imposes a cigarette excise tax on the amount of $1.60 per carton. The tax is im-

[27] "The duty rests on this Court to decide for itself facts or constructions upon which federal constitutional issues rest." *Kern-Limerick, Inc. v. Scurlock*, 347 U.S. 110, 121 (1954).

posed pursuant to RCW 82.24.020 upon the "sale, use, consumption, handling, possession or distribution" of cigarettes. The tax is collected by means of tax stamps affixed to individual packages of cigarettes. Retailers are required to either purchase pre-stamped cigarettes from wholesalers or purchase a supply of stamps from the State which are to be affixed to the cigarettes by the retailer *prior to sale.*[28] R.C.W. 82.24.020 provides that it is the intent and purpose of the state's cigarette taxing scheme to "collect the tax from the person who first sells, uses, consumes, handles, possesses, . . . or distributes them in the state." R.C.W. 82.24.080 further declares the intent and purpose of the state cigarette taxing scheme to first impose the tax "at the time and place of the first taxable event occurring in" the State of Washington. There is no tax on the "purchase" of cigarettes. The plain words of the statutes impose the tax on the seller rather than the purchaser. While this Court has the duty to decide the legal incidence of the tax,[29] it is noteworthy that the Washington Supreme Court has determined that the legal incidence of the cigarette tax falls upon the first person who brings cigarettes into the State and sells, uses, consumes or distributes them. *Canteen Service, Inc. v. State*, 83 Wn. 2d 761, 522 P.2d 847 (1974). The State

[28] This description in the state cigarette taxing scheme is taken from Appellant's Brief p. 17. The emphasis is supplied.

[29] See note 27.

candidly admits that in all other situations rather than sale by Indians and non-Indians alike that the first incidence of the tax falls on the retailer or distributor. However, the State and the District Court rely on *Tonasket v. State*, 84 Wn.2d 164, 525 P. 2d 744 (1974) and the later adopted Department of Revenue Rule 192 and Excise Tax Bulletin 504.80.192. *Tonasket* would settle the question if the question of legal incidence in this case rested with the state. It does not. It is for the federal courts to determine the legal incidence of the tax from the plain reading of the statute. *First Agricultural Bank v. Tax Commission*, 392 U.S. 339, 347 (1968); *Kern-Limerick, Inc. v. Scurlock*, 347 U.S. 110, 121 (1954). The plain reading of the statute shows that the legal incidence of the cigarette tax is on the *first* person who brings the cigarettes into the state and sells, uses, consumes or distributes them. Washington's actions show this to be their interpretation. They argue for first incidence on the purchaser to establish an exception from the "McClanahan principle," but then contend that they have the right to seize as contraband cigarettes destined to a distributor for these retailers prior to a sale to non-Indian purchasers. An inconsistent position. They cannot sustain their contention in both areas. While the state may not bind this court as to the interpretation of the language of the statute, state determination as to the necessary pro-

cedure regarding enactment of law and regulation is controlling. *Washington v. Yakima Indian Nation,* ..... U.S. ....., 58 L.Ed 2d 740, 763 n. 39 (1979). Department of Revenue Rule 192 and Excise Tax Bulletin 504.80.192 cannot amend or modify the statutes in question. The Washington Supreme Court has determined that statutes cannot be amended or modified by administrative rule or bulletin. *Pierce County v. State,* 66 Wn.2d 728, 731, 404 P.2d 1002 (1965); *Pringle v. State,* 77 Wn.2d 569, 464 P.2d 425, 573 (1970).

Under applicable law announced by this Court, such facts require a determination that the legal incidence is on the seller. *Polar Ice Cream and Creamery Co. v. Andrews,* 375 U.S. 361 (1964).

Likewise, the combined state-local[30] sales tax of plus five percent is imposed on the sale of tangible personal property and services at retail pursuant to R.C.W. 82.02.020. While the Department of Revenue by the promulgation of Administrative Regulation Rule 192 (WAC 458-20-192) on November 12, 1976 and publication of Excise Tax Bulletin 504-08-192 on November 24, 1976 purport to make certain exceptions for sales to tribal Indians, R.C.W. 82.32.020 still provides for a sales tax on all sales of tangible personal property and retail services in the State of Washington. R.C.W. 82.-

[30] Appellant's Brief p. 19. Certainly a misnomer. Local tribal governments with their governmental duties get no funds from this tax.

08.050 imposes the legal incidence of that excise tax on the seller in every sales transaction where payment is not made to the Department of Revenue. This personal liability of the seller results regardless of whether the non-payment is willful or beyond the sellers control. The facts of this case are that payment has not been made. The legal incidence of the tax is on the seller.

Finding the incidence of Washington's taxation scheme on the Indian, the "McClanahan principle" would exclude application of Washington's taxation scheme to Yakima retailers without reliance on the "Williams test" or tribal pre-emption.

CONCLUSION

From the reasoning and authority contained herein, we would submit that this is an appeal involving *jurisdiction* not *taxation* and the "McClanahan principle" not the "Williams test." It is this lack of jurisdiction over the Yakima Nation and its licensed retailers, that should determine that Washington's excise taxing, collection and reporting scheme can have no effect on these same Indians.

As an *additional* ground, Washington's excise taxing, collection and reporting scheme fails to meet the "Williams test" as determined by the District Court.

We would therefore conclude that this Court determine that Washington's excise taxing, reporting and collection scheme is void as it effects the Yakima Nation and its licensed retailers, and affirm the judgment and restraints imposed by the District Court below.

DATED: July 3, 1979.

Respectfully submitted,

JAMES B. HOVIS
HOVIS, COCKRILL & ROY
Counsel for Appellee,
Yakima Nation